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MISSOULA, MT

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PATRICK E. DUFFY  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

JAMES LARRY SHERRILL, JR.	)	CV 05-34-M-DWM
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
JANET COX, KATHY MCELDERRY,	)	
MISSOULA COUNTY COMMISSIONERS,	)	
MISSOULA COUNTY COURTS, MISSOULA	)	
COUNTY, KATHLEEN BREUER, GAYLE	)	
JOHNSTON, JUDGE JOHN HENSON,	)	
STATE OF MONTANA, WARDEN MIKE	)	
MAHONEY, and KENNETH COSBY,	)	
	)	
Defendants.	)	
	)	

**I. Introduction**

United States Magistrate Judge Leif B. Erickson entered Findings and Recommendation in this matter on March 2, 2006. Plaintiff received several extensions of time to file objections, the most recent of which required objections to be filed by September 8, 2006. Plaintiff's objections were filed on September 12, 2006. Accompanying those objections was a note indicating the objections were mailed on September 7, 2006, but

were mistakenly returned to the sender. Although Plaintiff's objections were untimely, this Court will review the record de novo in the interests of justice.

## **II. Background**

Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983, seeking damages for wrongful incarceration. Plaintiff alleges he was sentenced in open court to a ten-year suspended sentence on the condition that he enter and complete the Seattle Drug and Narcotic Center. The sentence set forth in the subsequent order of judgment, however, mistakenly omitted the word "suspended." As a result of this scrivener's error, Plaintiff was incarcerated for 155 days instead of being sent immediately to drug treatment.

After conducting a preliminary screening of Plaintiff's complaint, Judge Erikson recommended dismissing the complaint with prejudice because Plaintiff failed to name a culpable defendant who was not entitled to immunity. Plaintiff does not object to the dismissal of his claims against Defendants Judge John Henson, Kathleen Breuer, Gayle Johnston, Michael Mahoney, Missoula County Commissioners, Missoula County Courts, or the State of Montana, and I find no clear error in Judge Erickson's Findings and Recommendation with respect to these Defendants.

See McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981) (noting portions of Findings and Recommendation not specifically objected to are reviewed for

clear error). Plaintiff does object to dismissal with prejudice of his claims against Defendants Janet Cox, Kathy McElderry, Kenneth Cosby, and Missoula County. In particular, Plaintiff contends these claims should have been dismissed with leave to amend because the claims can be cured by amendment. See Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (providing "leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect" (quotations omitted)).

## **II. Analysis**

### **A. Defendants Cosby, Cox, and McElderry**

Defendant Kenneth Cosby is the grievance coordinator at the Montana State Prison. Defendants Janet Cox and Kathy McElderry work in the Montana State Prison Administration and Records Department. Plaintiff's complaint alleges these individuals violated Plaintiff's constitutional rights by failing to investigate his complaints regarding the mistaken order of judgment. In recommending dismissal with prejudice of Plaintiff's claim against Cosby, Judge Erikson determined Cosby did not violate Plaintiff's constitutional right because inmates do not have a separate constitutional right to any specific prison grievance procedure. With respect to Plaintiff's claims against Cox and McElderry, Judge Erikson acknowledged that prison officials who have a duty to investigate claims of computational errors in the calculation of prison sentences may be liable for

their failure to do so when a reasonable request is made. Nevertheless, Judge Erickson concluded the error in Plaintiff's case was not computational in nature; instead, it involved an error in the original order of judgment. According to Judge Erickson, prison record custodians have no duty to question a court's order of judgment, and thus, Cox and McElderry committed no culpable conduct.

Plaintiff argues his claims against Cosby, Cox, and McElderry should have been dismissed with leave to amend because he has a viable Eighth Amendment claim against these defendants. Detention beyond the termination of a sentence can constitute cruel and unusual punishment in violation of the Eighth Amendment "if it is the result of 'deliberate indifference' to the prisoner's liberty interest." Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985). In Alexander v. Perrill, 916 F.2d 1392, 1393-95 (9th Cir. 1990), an inmate requested that prison officials conduct an investigation into an alleged miscalculation in his sentence resulting from failure to give credit for time served in a foreign jail. The inmate subsequently filed a Bivens action, claiming the prison officials made no effort to investigate his claims. Id. at 1393, 1395. The inmate alleged the failure to investigate constituted deliberate indifference to his constitutional and statutory rights. Id. at 1395. In reviewing the district court's denial of qualified immunity, the

Ninth Circuit concluded prison officials may be liable for money damages when they have a duty to ensure the proper calculation of prison sentences, they are put on notice that a possible mistake has been made, and they undertake no investigation to determine whether the inmate's claims are meritorious. Id. at 1396, 1398; see also Haygood, 769 F.2d at 1354-55 (concluding evidence that prison officials refused to investigate a computational error after being put on notice of the error was sufficient to support a finding of liability for deliberate indifference). Although, unlike the instant case, Alexander involved a computational error in the calculation of a prisoner's sentence, the language of Alexander is not so limited. Instead, the case suggests a constitutional violation may arise where prison officials have a duty to investigate prisoner complaints and completely disregard that duty after being put on notice of a meritorious claim. See id. at 1396 (observing qualified immunity defense is unavailable where official fails to take an action he has a clearly established duty to take and that failure contributes to a violation of the plaintiff's constitutional rights); id. at 1398 (noting court "will not . . . embrace a rule which would allow prison officials to stand by idly after an inmate has raised the prospect that he is being unlawfully incarcerated and has provided documentary evidence in support of his claim").

In his objections, Plaintiff proposes to amend his complaint

to allege the following facts: Plaintiff put Cosby on notice that he was being imprisoned unlawfully by submitting a grievance on July 30, 2002. Plaintiff also made several informal written complaints to Cox and McElderry in an attempt to bring the sentencing error to their attention. It was clear from the face of the order of judgment that Plaintiff was being imprisoned unlawfully because the order stated "The Defendant is remanded to the custody of the Missoula County Sheriff until Defendant's counsel can arrange transportation to the Seadrunner Drug and Narcotic Center in Seattle, Washington."<sup>1</sup> Plaintiff also informed Cosby the sentencing transcript would verify his claims of error. Cosby, Cox, and McElderry did nothing in response to Plaintiff's claims.

If, in addition to these allegations, Plaintiff can demonstrate Cosby, Cox, and McElderry had a duty to investigate his claims of scrivener's error in the order of judgement, Plaintiff can state a claim for violation of his Eighth Amendment rights. Defendants' duty can be established by decisional law or prison regulations and policies. *Id.* at 1398. Because Plaintiff's complaint as originally drafted does not allege any such duty, the complaint is dismissed. Nevertheless, because

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<sup>1</sup>Plaintiff's claim of wrongful incarceration does not need to be clearly meritorious from the face of the grievance he lodged. See Alexander v. Perrill, 916 F.2d 1392, 1398 (9th Cir. 1990). Instead it is sufficient if the grievance raised a substantial question regarding the alleged error. *Id.* at 1399.

this Court is unwilling, at this time, to say no duty exists, the complaint is dismissed with leave to amend.

**B. Defendant Missoula County**

Judge Erickson recommended dismissing Plaintiff's claim against Defendant Missoula County because Plaintiff's complaint did not contain an allegation that the actions of the Clerks of Court were the custom, policy, and practice of Missoula County.

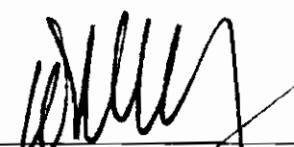
See Anderson v. Warner, 451 F.3d 1063, 1070 (9th Cir. 2006) (noting a local governmental entity is not liable under § 1983 unless the plaintiff can demonstrate the local governmental entity had a custom, policy, or practice that led to the deprivation of the plaintiff's constitutional right). Plaintiff argues he should be granted leave to amend his complaint to allege a custom, policy, or practice. The role of the Clerk of Court is generally to enter judgments as signed by a judge; Clerks generally do not question or correct errors in judgments. Therefore, it is unlikely Plaintiff will be able to cure his complaint by alleging a Missoula County custom, policy, or practice relating to Clerks of Court that caused the erroneous order of judgment in this case. Nevertheless, without further factual development, this Court is not willing to say Plaintiff's claim cannot possibly be cured by the allegation of additional facts. The Court therefore dismisses Plaintiff's claim against Missoula County with leave to amend.

**III. Conclusion**

Accordingly, IT IS HEREBY ORDERED that Plaintiff's claims against Defendants Judge John Henson, Kathleen Breuer, Gayle Johnston, Michael Mahoney, Missoula County Commissioners, Missoula County Courts, and the State of Montana are DISMISSED WITH PREJUDICE for the reasons set forth in Judge Erickson's Findings and Recommendation.

IT IS FURTHER ORDERED that Plaintiff's claims against Defendants Janet Cox, Kathy McElderry, Kenneth Cosby, and Missoula County are DISMISSED WITHOUT PREJUDICE for the reasons explained above.

Dated this 1<sup>st</sup> day of November, 2006.

  
Donald W. Molloy, Chief Judge  
United States District Court